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IN THE

# Supreme Court of the United States

October Term, 1946

No.

1310

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MANDEVILLE ISLAND FARMS, INC., a Corporation, and  
ROSCOE C. ZUCKERMAN,

*Petitioners,*

*vs.*

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,

*Respondent.*

Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit and  
Brief in Support Thereof.

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**Supreme Court of the United States**

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No. ....

**MANDEVILLE ISLAND FARMS, INC., a Corporation, and  
ROSCOE C. ZUCKERMAN,**

*Petitioners,*

*vs.*

**AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,**

*Respondent.*

**Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit.**

*To the United States Supreme Court:*

Petitioners Mandeville Island Farms, Inc., a corporation and Roscoe C. Zuckerman respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered January 14, 1947 in that court, in the case therein pending No. 11266 entitled "Mandeville Island Farms, Inc., a corporation and Roscoe C. Zuckerman, appellants, v. American Crystal Sugar Company, a corporation, appellee, and the order of said court dated March 27, 1947 denying petition for rehearing.

### 1. Jurisdiction.

The Judgment of the Circuit Court of Appeals was filed January 14, 1947; Petition for Rehearing was filed February 12, 1947; and an Order denying said Petition for Rehearing was filed March 27, 1947. This Petition is being filed within three months of the filing of said Order of the Circuit Court of Appeals denying said Petition for Rehearing. The jurisdiction of the Supreme Court is invoked under Section 240-a of the Judicial Code of the United States, as amended by Act of February 13, 1925 (28 U. S. C. A., Sec. 347-a).

### 2. Opinions Below.

The opinion of the District Court in support of its decision is printed in 64 Fed. Supp. 265. It appears in the Transcript at pages 100-108.

The Circuit Court of Appeals rendered a *per curiam* opinion on petitioners' appeal. This opinion is printed in 129 F. (2d) 71. It appears in the Transcript at pages 120-21. The order denying the petition for rehearing was a *per curiam* order without opinion. It is not yet reported. It appears in the Transcript at page 123.

### 3. Statute Involved.

This is an action brought by persons injured in their business and property by reason of acts forbidden in the Anti-Trust Laws of the United States (15 U. S. C. A. Secs. 1, 2, 7, 15, commonly called the "Sherman Act"), and brought in the District in which defendant is found and has an agent, to recover three-fold damages.

#### 4. Statement of the Case.

This is a petition to secure review of an order of the Circuit Court of Appeals for the Ninth Circuit affirming the decision of the District Court (and from an order denying a rehearing), which District Court decision granted a motion to dismiss and dismissed the amended complaint brought under the Sherman Anti-Trust Act for damages, on the ground that the amended complaint did not state facts sufficient to constitute a claim upon which relief could be granted.

Inasmuch as the District Court granted a motion to dismiss without the introduction of any evidence, the allegations of the amended complaint must be taken as true. (*Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 414.).

The amended complaint sets forth a conspiracy to fix and maintain prices paid sugar beet growers by all of the sugar refineries in Northern and Central California wherein these refineries, engaged in interstate commerce, agreed upon and maintained the same price and same contract with all growers in the area.

The amended complaint alleges (Roman numerals refer to paragraph numbers of the complaint, Arabic to Transcript page numbers):

"Mandeville Island is a tract of land located in California north of the 36th parallel suitable in composition, drainage, irrigation, location, and climate and transportation facilities for the successful raising of sugar beets suitable for processing into sugar. At all times herein mentioned plaintiffs have had supplies, equipment, tools, personnel, labor, organization, and knowledge adequate for the successful raising on

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Mandeville Island of sugar beets suitable for processing into raw sugar." [III—T. 69-70.]

"On September 11, 1939, the second world war broke out and thereafter and up to December 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defenses against its possible entry into said conflict. On December 7, 1941, the Japanese attacked the United States at Pearl Harbor. This was followed by declaration of war between the United States and all the members of the Axis. At all times from September 11, 1939, the sugar beet industry was and now is one of the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continues. The various steps involved in the production and protection of beet sugar, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar and the sale and distribution of sugar in interstate commerce to the ultimate consumer, were at all times herein mentioned and now are inextricably intermingled with and directly affected by each other and have an immediate relation on each other. Each of said steps was at all times herein mentioned and now is a part of a transaction that commenced when the ground was prepared for planting the sugar beet seed and was completed when the sugar was used by the ultimate consumer." [V—T. 70-71.]

"During the crop seasons 1938 to 1942, large acreages of agricultural land in the United States, . . . were planted to sugar beets. Said

sugar beets, when harvested, were not sold in central markets . . . but were produced by growers under contract with manufacturers . . . and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. . . . " [VI—T: 71-72.]

"The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and no grower of sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers.

"The sugar manufactured from said sugar beets was, during all of said period, sold in interstate commerce throughout the United States.

"After the raw sugar had been produced, it was impossible to distinguish the manufactured beet sugar.

manufactured from sugar beets grown in any one part of the United States from that manufactured from sugar beets grown in any other part of the United States.

"During said period above referred to, the only sugar beet seeds available in said portion of California were those securable from one of said three manufacturers and the only method of sale of marketable sugar beets used by growers of sugar beets in said area of California was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets." [VI—T. 72-73.]

"In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturers. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacture of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding

month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured raw sugar in interstate commerce." [VII—T. 74.]

"Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined under the contracts by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. . . . But during the crop seasons of 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were delivered and by whom the beets were manufactured into raw sugar." [VIII—T. 74-75.]

"Thereupon and some time in 1937 or 1938, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants

were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all in violation of the anti-trust laws of the United States; and as a part of said unlawful conspiracy agreed among themselves to do and did as follows during the crop years 1939, 1940, and 1941

"(a) Each no longer competed against any of the others as to the price to be paid the growers for sugar beets raised in California north of the 36th parallel.

"(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to-wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspirators north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

"(c) Each no longer competed with any of the other manufacturers of sugar north of the 36th parallel as to efficiency of sales, or manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organization of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.

"(d) Instead of paying the growers of sugar beets a reasonable price for their beets, each of said conspirators furnished seeds to, entered into contracts

with and bought beets only from growers who signed a standard printed form of contract prepared by said manufacturers, identical in all material terms. Farmers contemplating or desirous of growing sugar beets either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a market to sell their marketable beets except for hog or cattle feed at a large loss.

"(e) Said prices agreed upon by defendant and its co-conspirators to be paid by them and paid by them to plaintiffs and other sugar beet growers in California north of the 36th parallel and set forth in said contracts are not the reasonable prices for sugar beets. . . . " [IX—T. 75-77.]

"Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant were 3.641 cents per pound while, at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .265 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel who had contracted with defendant received on the average from 29½ cents to 52½

cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of identical beets of identical sugar content delivered to the other manufacturers of beet sugar in California north of the 36th parallel." [X—T. 77-78.]

"During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer any such competition between the conspirators.

Defendant, as a result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said crop years than it would have had competition been free from and unrestrained by said conspiracy and plaintiffs did not receive the reasonable value of their sugar beets." [XI—T. 78-79.]

"As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said

conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated, in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar beet factories in California north of the 36th parallel but with three completely separate overheads and with none of the efficiency that consolidation into one corporation might bring." [XII—T. 79-80.]

"Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract and said conspiracy has been continued thereafter up to the present time in so far as defendant and each of its co-conspirators still refuse and will not make payments to any of the growers other than in accordance with the method agreed upon in said conspiracy as above set forth, and will not furnish any of the growers the individual, as contrasted with the pooled, sales return of the particular manufacturer with whom said grower dealt. Plaintiffs herein demanded in writing such information of defendant but defendant refused to and has not furnished the same." [XIII—T. 80.]

Defendant and Mandeville entered into one of defendant's standard form contracts for the 1939 and 1940 crop seasons, and defendant and Zuckerman for the 1941 crop season. Plaintiffs performed each and every term, condition and covenant on their part to be performed in said contracts and Mandeville delivered 22,355.6 tons of sugar beets in the 1939 crop year and 25,430.3 tons of sugar beets in the 1940 crop year and Zuckerman delivered 14,144.7 tons of

sugar beets in the 1941 crop year, of average sugar content specified in the complaint. Defendant accepted the sugar beets and manufactured them into sugar. [XV, XVI, XVII—T. 83, 84, 85.]

"The net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north of the 36th parallel; but in carrying out said conspiracy and as a part and parcel thereof, defendant paid plaintiff not upon the price secured in interstate commerce from beets refined by defendant nor upon the reasonable value of the sugar beets, but in accordance with the average net return secured in interstate commerce for sugar by all manufacturers of beet sugar with refineries in California north of the 36th parallel" in accordance with the conspiracy. "Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc., would have received at least \$105,014.60 more and plaintiff Roscoe C. Zuckerman would have received at least \$37,397.38 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damage has been paid." [XVIII—85, 86.]

An example of the method of paying the grower under the contract follows: The grower whose beets had a 20% sugar content in 1940 received \$5.66 per ton for his beets if the sugar refineries received a net average of  $3\frac{1}{2}$ ¢ per lb. for the raw sugar when sold in interstate commerce, \$7.22 per ton if the refineries received a net average of 4¢ per lb. and \$9.31 per ton if the refineries received 5¢ per lb.

The District Court, while holding that the contracts on their faces showed a combination to fix and maintain prices in restraint of trade, held that plaintiff-farmers could not recover for two reasons: first, production of the sugar beets and their manufacture into sugar were "local" and not "interstate", therefore, there was no violation of the Sherman Act (citing the old tax case of *Coe v. Errol* 116 U. S. 517, and various cases which followed it); and second, even if there were a violation of the Sherman Act, plaintiffs could not recover because the contracts were on their faces so palpably in restraint of trade that the plaintiffs became *in pari delicto* by entering into them.

Plaintiff-farmers appealed to the Circuit of Appeals for the Ninth Circuit. That Court, ignoring the many recent cases under the Sherman Act, affirmed the District Court on its first ground, but did not "reach" the second. In affirming the District Court on its first ground the Circuit Court of Appeals stated: "We have carefully examined the opinion and approved it except in the instances hereinafter set forth. We do not approve the citation of tax cases as authority for any issue in the case, although their citation presents no inconsistency in the opinion." Nevertheless, of the five cases cited by the District Court in support of its first point, one was a tax case (*Coe v. Errol*), three were cases which followed and relied upon *Coe v. Errol*, while the fifth (*Parker v. Brown*), instead of being in support of the District Court, was directly to the contrary!

A Petition for Rehearing was filed. This was denied by the Circuit Court of Appeals and this Petition for Certiorari follows.

## 5. Questions Presented.

### A. THE PRIMARY QUESTION PRESENTED IS THIS:

Have plaintiff-farmers a cause of action under the Anti-Trust Act under the following facts: The various steps involved in the production of beet sugar (purchase of the seed by the grower, the planting of the seed, the growing and harvesting of the beets, the delivery of the beets to the refinery, the processing of the beets into sugar, and the sale and distribution of the sugar in interstate commerce) were at all times herein mentioned inextricably intermingled and directly affected by each other and had an immediate relation upon each other. Each of said steps at all times herein mentioned was part of a transaction that commenced when the ground was prepared for planting the seed and was completed when the sugar was used in interstate commerce by the ultimate consumer. Three corporations, of which defendant was one, had a complete monopoly in the supply and sale of sugar-beet seed and the manufacture of sugar beets into sugar in California north of the 36th parallel (*i. e.*, Northern and Central California.) They owned and controlled all sugar beet factories there located. No growers of sugar beets in the area could sell sugar beets at a profit except to them. They had the only practical market available to beet growers in the area. Prior to the crops season of 1939, these three corporations competed with each other. But in 1937 or 1938 they entered into a conspiracy whereby they agreed to and did operate, in so far as the growers were concerned, as if they were only one corporation owning and controlling all sugar beet factories in Northern and Central California, but with three completely separate overheads and with none of the efficiency

which consolidation into one corporation might bring. They no longer competed as to the price to be paid sugar beet growers. They fixed and maintained the price to be paid sugar beet growers. They adopted a uniform contract which provided that the price to be paid growers should be determined by the average net return received by the three refineries from the sale of the raw sugar in interstate commerce, regardless of the price received by the particular refinery with whom a particular grower contracted. They paid the same agreed price to all growers, which price was not a reasonable price. They refused to furnish seed to or buy sugar beets from any grower, unless he would sign their uniform contract and the grower had either to sign the contract or not grow sugar beets. They no longer competed in interstate commerce as to the ability and efficiency of their respective manufacturing, sales or executive departments; they no longer endeavored to increase sales returns or decrease expenses as they had formerly done. They so conducted their interstate commerce, without competition, that they received less returns for sugar sold in interstate commerce and incurred more expense than had there been competition. Plaintiff-farmers owned land in Central California, particularly suitable to the growing of sugar beets and had the facilities and knowledge for growing sugar beets. They either could not grow any sugar beets at a time when sugar was a vital need to this nation, or had to sign one of the standard contracts with one of the conspirators. They signed with defendant. Had it not been for the conspiracy and if the sugar had been manufactured and sold in competition instead of under the conspiracy, plaintiff-farmers would have received many thousands of dollars more for their sugar than they did receive.

B. THIS PRIMARY QUESTION MAY BE DIVIDED INTO SECONDARY QUESTIONS, AS FOLLOWS:

1. Inasmuch as Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied, but exercised all the power it possessed, are cases arising under various acts passed by Congress under the Commerce Clause authoritative in cases arising under the Sherman Act?

2. Where the contract between the growers and the refinery provided that the price to be paid by the refinery to the growers for the beets was fixed by the returns secured by the refinery from the interstate sale of the processed product, and where the amount to be paid the grower could not be determined until the sugar was sold in interstate commerce, was interstate commerce involved?

3. Where, under the contract, the grower was really selling sugar to the refinery because it was only the sugar in the beets for which he was paid, and where the sugar, when extracted, was sold in interstate commerce by a sale which determined the price paid the grower for the beets, was interstate commerce involved?

4. Where the various steps involved in the production of beet sugar, from the preparation of the ground for planting of the seed to the sale in interstate commerce of the extracted sugar were inextricably intermingled with and directly affected by each other and were part of one transaction, was interstate commerce involved?

5. Are products of the farm which are subsequently manufactured or processed into articles of interstate commerce within the reach of the Anti-Trust Act?

6. Is price-fixing illegal *per se* under the Sherman Act?

7. Is a combination among interstate processors fixing prices to be paid to local producers for their products reached by the Sherman Act if the processed product is intended to cross state lines?

8. Where the price-fixing acts complained of were a part of the conspirators' interstate commerce, does a plaintiff's cause of action depend upon the plaintiff himself being engaged in interstate commerce?

9. Where the growing of beets, the processing of them into sugar and the sale of the sugar were part of the stream of interstate commerce, if all done by the refiner, was that stream broken if an independent contractor, instead of the refiner itself, did the growing?

10. Should persons damaged by price-fixing conspiracies be denied recovery because some other persons were not damaged to the same extent?

11. Where a combination fixes prices to be paid producers for the raw product, can it escape liability to them by not raising prices to the ultimate consumer of the processed product?

12. Are early cases involving local taxation or regulation in matters involving the safety, health and well-being of local communities authoritative as to actions under the Sherman Act?

13. Where a farmer either had to sign the standard crop contract prepared by the price-fixing conspirators or not grow any sugar at a time when sugar was vitally needed by the nation, was he *in pari delicto* because he signed the contract?

**6. Specifications of Error To Be Urged.**

Petitioners rely upon the following specifications of error:

1. The Circuit Court of Appeals erred in affirming the District Court's order which granted defendant's motion to dismiss.

2. The Circuit Court of Appeals erred in affirming the District Court in rendering judgment of dismissal in favor of defendant, American Crystal Sugar Company, and against plaintiffs, which judgment was entered and noted in the District Court Civil Docket, January 14, 1946.

3. The Circuit Court of Appeals erred in denying the petition of appellants for rehearing.

4. The Circuit Court of Appeals erred in holding that plaintiff-farmers had no cause of action under the Sherman Act under the facts alleged in the amended complaint.

5. The Circuit Court of Appeals erred in holding that no interstate commerce was involved where the contract between the growers and the refinery provided that the price to be paid by the refinery to the growers for the beets was fixed by the returns secured by the refinery from the interstate sale of the processed product and where the amount to be paid the growers could not be determined until the sugar was sold in interstate commerce.

6. The Circuit Court of Appeals erred in holding that interstate commerce was not involved where, under the contract, the grower was really selling the sugar in the beets to the refinery, and where the sugar, when extracted, was sold in interstate commerce by a sale which determined the price paid the grower for the beets.

7. The Circuit Court of Appeals erred in holding that interstate commerce was not involved where the various steps involved in the production of beet sugar, from the preparation of the ground for the planting of the seed to the sale in interstate commerce of the extracted sugar, were inextricably intermingled with and directly affected by each other and were part of one transaction.

8. The Circuit Court of Appeals erred in holding that products of the farms which were subsequently manufactured or processed into articles of interstate commerce were beyond the reach of the Sherman Act.

9. The Circuit Court of Appeals erred in not holding that price fixing is illegal *per se* under the Sherman Act.

10. The Circuit Court of Appeals erred in holding that a combination among interstate processors in fixing prices to be paid local producers for their products is not reached by the Sherman Act, even though the processed product is intended to cross state lines.

11. The Circuit Court of Appeals erred in holding that plaintiff's cause of action under the Sherman Act depends upon the plaintiff himself being engaged in interstate commerce, even though the price-fixing acts complained of were a part of the conspirator's interstate commerce.

12. The Circuit Court of Appeals erred in holding that where the growing of beets and processing of them into sugar and sale of the sugar were part of the stream of interstate commerce done by the refinery, that stream was broken if an independent contractor, instead of a refinery, did the growing.

13. The Circuit Court of Appeals erred in holding that persons damaged by price-fixing conspiracies should be

denied recovery merely because some other persons were not damaged to the same extent.

14. The Circuit Court of Appeals erred in holding where a combination fixes prices to be paid producers for the raw product, it can escape liability to them by not raising prices to the ultimate consumer of the processed product.

15. The Circuit Court of Appeals erred in applying cases which involved local regulation in matters involving the safety, health and well-being of local communities as authoritative in actions under the Sherman Act.

16. The Circuit Court of Appeals erred in not repudiating the holding of the District Court that where a farmer either had to sign the standard crop contract prepared by the price-fixing conspirators or not grow any sugar, at a time when sugar was vitally needed by the nation, that farmer became *in pari delicto* by signing the contract.

## 7. Reasons Relied Upon for Allowance of Writ.

1. The Circuit Court of Appeals has decided certain questions arising out of the Sherman Anti-Trust Act in a way which conflicts with the decisions of the Supreme Court.

(a) It held that since the production of sugar beets, the delivery by the farmer to the refinery and the refining of the sugar beets all took place within the State of California, those transactions should be separated, in so far as the Sherman Anti-Trust Act is concerned, from the balance of the interstate transaction of which they were inseparable parts, contrary to *American Tobacco Co. v. U. S.*, 328 U. S. 781; *W. H. Montague & Co. v. Lowry*, 193

U. S. 38; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *U. S. v. South-Eastern Underwriters Association*, 322 U. S. 533; *Curriu v. Wallace*, 306 U. S. 1; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533.

(b) It considered an isolated, local transaction in determining the application of the Sherman Anti-Trust Act instead of drawing the true prospective from the entire picture by ignoring the fact that the grower was really selling the sugar in his beets and that the price paid him was determined by the average net return secured by the refineries from the sale of the raw sugar in interstate commerce, contrary to *U. S. v. South-Eastern Underwriters Association*, 322 U. S. 533, 536; *U. S. v. Bausch & Lomb Optical Co.*, 321, U. S. 707, 720; *Nippert v. Richmond*, 327 U. S. 416.

(c) It held that products of the farm which were subsequently manufactured or processed into articles of interstate commerce were beyond the reach of the Sherman Anti-Trust Act, contrary to *American Tobacco Co. v. U. S.*, 328 U. S. 781; *Wickard v. Filburn*, 317 U. S. 111; *Curriu v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465; *Mulford v. Smith*, 307 U. S. 38.

(d) It held that the fixing and maintenance of local retail prices removed a conspiracy from the scope of the Sherman Act, contrary to *U. S. v. Univis Lens Co.*, 316 U. S. 241, 253; *Ethyl Gasoline Corp. v. U. S.*, 309 U. S. 436, 458; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720; and *American Tobacco Co. v. U. S.*, 328 U. S. 781.

(e) It did not apply the rule of law that price fixing and price maintenance combinations are illegal *per se* under the Sherman Act, as set forth in *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 296; *U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, 212, 213, 218; *U. S. v. Masonite Corp.*, 316 U. S. 265, 274; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.

(f) It held that practices affecting a product before the product crossed the State line could not be reached by the Sherman Act, even though it was intended that the product was to be placed in interstate commerce and even though the practices were part of the entire transaction, contrary to *American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720; *U. S. v. Frankfort Distilleries*, 324 U. S. 293; *Curry v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120; *Local 167 v. U. S.*, 291 U. S. 293, 297.

(g) It held that one group of farmers injured by a price fixing and price maintenance conspiracy could not recover if some other farmers were not injured, contrary to the ruling in *U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, 212, 213, 218; *U. S. v. Bausch & Lomb Optical Co.*, 327 U. S. 707, 720, and *U. S. v. Aluminum Co. of America*, 148 F. (2d) 416, that price fixing agreements are illegal *per se* and that good motives or economic results are immaterial.

(h) It held that no matter if prices paid the original producer or seller of a commodity are fixed by processors, there can be no violation of the Sherman Act unless and until prices are raised to the ultimate buyer of the processed product, contrary to the decision in *American To-*

*bacco. Co. v. U. S.*, 328 U. S. 781 and *U. S. v. Aluminum Co. of America*, 148 F. (2d) 416.

(i) It held that if the sugar beets had not been processed into raw sugar but had been sold by defendant as sugar beets in interstate commerce, the Sherman Act would apply to the price-fixing conspiracy here involved, but that the chain of interstate commerce was broken because the sugar beets were processed by an intrastate operation into raw sugar, contrary to *American Tobacco Co. v. U. S.*, 328 U. S. 781; *Wickard v. Filburn*, 317 U. S. 111; *Currin v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Company*, 315 U. S. 110; and *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726.

(j) The court below impliedly held that while the raising of the beets and the manufacture of the sugar were part of the chain of interstate commerce under various Federal statutes, they were not under the Sherman Act, contrary to the decisions in *Atlantic Cleaners & Dyers, Inc. v. U. S.*, 286 U. S. 427, 435; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495; *U. S. v. Darby*, 312 U. S. 100; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 298, wherein it was held that Congress, in passing the Sherman Act, left no area of its constitutional powers unoccupied.

(k) It relied upon early cases involving local regulation in matters involving the safety, health and well-being of local communities and applied the mechanical, legal formulas there set forth, contrary to the decisions in *Wickard v. Filburn*, 317 U. S. 111; *Parker v. Brown*, 317

U. S. 341; *U. S. v. Wrightwood Dairy Company*, 315 U. S. 110; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *U. S. v. Darby*, 312 U. S. 100; *U. S. v. Rock Royal Coop.*, 307 U. S. 533; *Currin v. Wallace*, 306 U. S. 1, 12; and *Mulford v. Smith*, 307 U. S. 38, 47.

(l) It reached a conclusion directly opposite to that reached by *American Tobacco Co. v. U. S.*, 328 U. S. 781, which held that restraints of trade identical with those here involved violated the Sherman Act.

(m) It held that the stream of interstate commerce was broken by having an independent contractor perform some of the steps within the boundaries of a State, contrary to *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173 and *Roland Electric Co. v. Walling*, 326 U. S. 657.

2. This decision of the Circuit Court of Appeals leaves the Ninth Circuit out of step, in so far as the Sherman Anti-Trust Act is concerned, with the rest of the nation; with the long since discarded mechanical tests of "manufacture", "production", "direct", "indirect", "local", used to determine whether the Sherman Act applies, instead of limiting such mechanical tests to cases involving local taxation and regulation.

3. If this decision is allowed to remain as the law of the Ninth Circuit, farmers therein will be helpless at the hands of processors, refiners, canners, packers, creameries, etc., engaged in interstate commerce who can, with im-

punity, fix and maintain prices to be paid farmers, restrain trade and create a monopoly as long as they do these things to the farmers, state by state, and have the processing, packing, refining, canning, etc., done within the state of the production of the raw product.

4. If this decision is left as it is, there will be one application of the Sherman Act for farmers and producers in the United States in general, and a different one for those within the Ninth Circuit with the decision in the *Big Three Tobacco Company* cases not applying in the Ninth Circuit.

5. Price-fixing agreements among persons engaged in interstate commerce which heretofore have been illegal *per se*, will be recognized as legal within the Ninth Circuit as long as the price-fixing agreements apply only to the purchase of a commodity which is processed, refined, manufactured, canned or otherwise worked upon within the state of production before it crosses state lines.

6. The result of this decision is that many, perhaps most, victims of restraint of trade are denied relief under the Sherman Act and private remedies to them under the Act become illusory if not quite non-existent.

Wherefore, your petitioners respectfully pray that this petition be granted and that a Writ of Certiorari issue as above set forth.

Dated: April 24th, 1947.

GUY RICHARDS CRUMP,  
*Attorney for Petitioners.*

**Certificate of Counsel.**

I, counsel for Petitioner, hereby certify that in my opinion the above Petition is well founded and not interposed for delay.

**GUY RICHARDS CRUMP.**

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1946.

No. ....

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**MANDEVILLE ISLAND FARMS, INC., a Corporation, and  
ROSCOE C. ZUCKERMAN,**

*Petitioners,*

*vs.*

**AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,**  
*Respondent.*

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**Brief in Support of Petition for Writ of Certiorari to  
the United States Circuit Court of Appeals for  
the Ninth Circuit.**

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**I—INTRODUCTORY MATTER.**

**1. Opinions Below.**

The opinion of the District Court is printed in 64 Fed. Supp. 265, and in the Transcript at pp. 100-108. The Circuit Court of Appeals rendered a *per curiam* opinion which is printed in 159 Fed. (2d) 71, and in the Transcript at pp. 120-121. Its order denying petition for rehearing was without opinion, and appears in the Transcript at p. 123.

## **2. Jurisdiction.**

The Judgment of the Circuit Court of Appeals was filed Jan. 14, 1947; Petition for Rehearing was filed Feb. 12, 1947; the Order denying it was filed March 27, 1947. This petition is being filed within three months of the filing of said Order. The jurisdiction of the Supreme Court is invoked under Sec. 240-a of the Judicial Code of the United States, as amended by Act of Feb. 13, 1925 (28 U. S. C., Sec. 347-a).

## **3. Questions Presented.**

These are set forth in the attached Petition and are incorporated herein by reference.

## **4. Statutes Involved.**

This is an action brought by persons injured in their business and property by reason of acts forbidden in the Anti-Trust Laws of the United States (15 U. S. C. A., Secs., 1, 2, 7, 15), commonly called the "Sherman Act", and brought in the District, in which defendant is found and has an agent, to recover threefold damages.

## **5. Statement of the Case.**

This is set forth in the attached Petition and is incorporated herein by reference.

## **6. Specifications of Error to Be Urged.**

These are set forth in the Petition and are incorporated herein by reference.

## II—SUMMARY OF ARGUMENT

1. Congress in passing the Sherman Act left no area of its constitutional power unoccupied. It exercised all the power it possessed. Therefore, cases arising not only under the Sherman Act but also under other acts passed by Congress under the Commerce Clause, are authoritative.
2. Since this is an appeal from an order granting a motion to dismiss the complaint on the grounds that it did not state facts sufficient to constitute a claim upon which relief could be granted, the allegations of the complaint must be taken as true. The amended complaint shows on its face a conspiracy to restrain trade by fixing and maintaining prices and to create and maintain a monopoly, as a result of which plaintiffs were injured.
3. Respondents conceded and the courts below held that a conspiracy to fix and maintain prices in restraint of trade, which damaged plaintiffs, was alleged but the District Court held that the Sherman Act was not violated on the ground that "production" and "manufacture" are "local" and not interstate, regardless of the balance of the transaction. It further held that plaintiffs, by signing the contract, became *in pari delicto*. The Circuit Court of Appeals approved the first ground but did not "reach" the second.
4. The courts below erred in holding that the price-fixing combination herein involved did not come under the Sherman Act, for several reasons, any one of which is sufficient to require a reversal of the judgments below. These reasons are:
  - (a) The contract between the grower and the refinery provided that the price to be paid by the refinery to the

grower for the beets was fixed by the returns secured by the refinery in the interstate sale of the processed product. Until the sugar was sold in interstate commerce, the amount to be paid the grower could not be determined. Therefore interstate commerce was involved.

(b) Under the contract, the grower was really selling sugar to the refinery because it was only the sugar content in the beets for which he was paid. This sugar, when extracted, was sold in interstate commerce. This latter sale determined the price paid the grower for the beets.

(c) The complaint specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting of the seed to the sale of interstate commerce of the extracted sugar, were "inextricably intermingled with and directly affected by each other" and part "of one transaction."

(d) Products of the farm which are subsequently manufactured or processed into articles of interstate commerce are within the reach of the Anti-Trust Act. Price-fixing is illegal *per se*. A combination among interstate processors fixing prices to be paid to local producers for their products is reached by the Sherman Act if the processed product is intended to cross state lines.

(e) Plaintiffs' cause of action does not depend on plaintiffs being engaged in interstate commerce where the price-fixing acts complained of were part of the conspirators' interstate commerce.

(f) If respondent itself had grown the beets besides refining them and selling the sugar, each step would have been part of the stream of interstate commerce. This stream was not broken because an independent contractor performed some of the steps.

5. The courts below erred in holding that appellants, although damaged by the price-fixing conspiracy, could not recover because some other farmers were not damaged to the same extent.

6. Trade includes both buying and selling. It is no excuse for monopoly that prices are not raised to the ultimate consumer.

7. The District Court relied upon the 1886 decision of *Coe v. Errol* (a tax case) and upon cases following it. *Coe v. Errol* is no longer any authority on cases arising under the Sherman Act. The Circuit Court of Appeals stated: "We do not approve the citation of tax cases cited as authority for any issue in this case," but the remaining cases cited by the District Court (and approved by the Circuit Court of Appeals) are, with one exception, cases that rely upon the tax case of *Coe v. Errol*. The one case that does not is *Parker v. Brown*, which supports appellants' and not respondent's position. As a result, the decision of the Circuit Court of Appeals has no foundation of authority whatsoever.

8. The District Court erred in holding that farmers who either had to sign the crop contract prepared by the conspirators or not grow any sugar at a time when sugar was vitally needed by this nation, were *in pari delicto* and could not recover because they "joined the conspiracy and furthered the object of the same" by signing the contract. This doctrine would result in making "private remedies under the Sherman Act illusory, if not non-existent, for many, perhaps most, victims of restraint of trade." The Circuit Court of Appeals should not have remained passive when faced with such a doctrine but should have definitely repudiated it.

### III—ARGUMENTS AND AUTHORITIES IN SUPPORT OF THE PETITION.

1. (Introductory.) Congress in Passing the Sherman Act Left No Area of Its Constitutional Power Unoccupied. It Exercised All the Power It Possessed.

Congress has passed various statutes under the Commerce Clause, but in passing the Sherman Act it "left no area of its constitutional power unoccupied; it exercised all the power it had." (*Atlantic Cleaners and Dyers, Inc. v. U. S.*, 286 U. S. 427, 435; *Apex Hosiery Company v. Leader*, 310 U. S. 469, 495; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 298. See also *U. S. v. Darby*, 312 U. S. 100, limiting *Carter v. Carter Coal Co.*, 298 U. S. 238, and holding (p. 122) that "The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce.")

Therefore, we will hereafter cite as authority cases arising not only under the Sherman Act but also under various other acts passed by Congress under the Commerce Clause.

2. Respondent Conceded and the Courts Below Held That a Conspiracy to Fix and Maintain Prices in Restraint of Trade, Which Damaged Plaintiffs, Was Alleged but the Lower Courts Held That the Sherman Act Was Not Violated on the Ground That "Production" and "Manufacture" Were "Local" and Not Interstate. A Mere Reading of the Complaint Shows That the Courts Below Erred.

Since this is an appeal from an order granting a motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a claim upon which relief could be granted, the allegations of the complaint must be taken as true. (*Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 414). These are set forth in the Transcript, pp. 68 to 96 and most of them in the petition. They can be summarized as follows:

A. The steps involved in the interstate production of beet sugar (the growing, harvesting, and delivery of the beets to the refinery, the processing of the beets into sugar, and the sale and distribution of the raw sugar in interstate commerce to the ultimate consumer), were at all times herein mentioned inextricably intermingled with and directly affected by each other and had an immediate relation to each other. Each step was a part of a transaction which commenced when the ground was prepared for planting and which was completed when the sugar was used by the ultimate consumer. [V.—T. 71.]

B. Defendant and its two co-conspirators were engaged in interstate commerce in the selling of sugar-beet seeds, the refining of sugar beets into sugar and the sale of the sugar throughout the country. [II—T. 68-69.]

C. The defendant and its two co-conspirators had a complete monopoly in the sale of sugar-beet seeds and the manufacture of sugar-beets into sugar in Northern and Central California. They owned and controlled all sugar-beet factories there located. No growers of sugar beets in the area could sell sugar beets at a profit except to them. They had the only practical market available to beet growers in the area. [VI—T. 71-74.]

D. Up to and including the 1938 crop season, these three corporations competed with each other, [X—T. 77-78], but in 1937 or 1938 they entered into a price-fixing conspiracy in restraint of trade and to create a monopoly [IX—T. 76-77], whereby, during the cropping years of 1939, 1940 and 1941;

(a) they adopted a uniform contract which provided that the price to be paid the growers should be determined by an *identical* formula, under which the average net return received by all three conspirators from the sale of the raw sugar in interstate commerce, determined the price paid each grower regardless of with which conspirator the grower contracted. [IX—T. 77];

(b) they paid the same agreed price to all growers, which price was not a reasonable price [IX—T. 77];

(c) they refused to furnish seed (the supply of which they controlled) to, or buy sugar beets from any grower unless he would sign their uniform contract and the grower had either to sign the contract or not grow sugar beets [VI—73];

(d) they no longer competed as to the price to be paid sugar beet growers [IX—T. 78];

(e) they fixed and maintained the price to be paid sugar beet growers [IX—T. 76];

(f) they no longer competed in interstate commerce as to the ability and efficiency of their respective manufacturing, sales or executive departments [IX—T. 76-77];

(g) they no longer endeavored to increase their sales returns and decrease their expenses as they formerly had done [XI—T. 78-9];

(h) they so conducted their interstate commerce without competition that they received less in sales return for sugar sold in interstate commerce and incurred more expense than they would have had there been competition [XII—T. 79];

(i) they operated as if they were one corporation owning and controlling all sugar-beet factories in Northern and Central California but with three completely separate overheads and none of the efficiency which consolidation into one corporation might bring [XII—T. 79-80].

As a result of this conspiracy plaintiffs were damaged. The complaint alleges: [XVIII—T. 85-6].

“Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc. would have received at least \$105,014.60 more, and plaintiff Roscoe C. Zuckerman would have received \$37,397.38 more than each did receive under said contracts, and plaintiffs respectively sustained damages accordingly.”

We respectfully submit that a mere reading of the complaint shows that the courts below erred. However, from an abundance of caution, we will particularize upon our position and analyze the factors that led the lower courts into error.

**3. The Courts Below Erred in Holding That the Price-Fixing Combination Herein Involved Did Not Come Under The Sherman Act.**

The courts below held that the processing of the beets into sugar broke the chain of interstate commerce. This was in error for *anyone* of six reasons each of which we shall discuss.

**A. The Contract Between the Growers and the Refinery Provided that the Price To Be Paid by the Refinery to the Grower for the Beets Was Fixed by the Returns Secured by the Refinery From the Interstate Sale of the Processed Product. Until the Sugar Was Sold in Interstate Commerce, the Amount To Be Paid the Grower Could Not Be Determined. Therefore, Interstate Commerce Was Involved.**

This price provision brought the entire contract into interstate commerce; if it were removed, there would be no contract, because there would be no method whatsoever for determining the price to be paid the grower for his beets. Yet the courts below ignored this provision and decided the case as if the contract were one completely carried out within a state with no relationship between the price to be paid the grower and the sale of the processed product in interstate commerce. In so doing the court erred. (*American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 546; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38.)

B. Under the Contract the Grower Was Really Selling Sugar to the Refinery Because It Was Only the Sugar in the Beets for Which He Was Paid. This Sugar, When Extracted, Was Sold in Interstate Commerce. This Latter Sale determined the Price Paid the Grower for the Beets. Therefore, Interstate Commerce Was Involved.

The grower was not paid X dollars per ton for his beets—the price paid him was determined by the sugar content of the beets and the net price received by the refiners from the sale in *interstate commerce* of the raw sugar during the crop year.

The true perspective must be drawn from the whole picture, not from an isolated, local transaction. (*U. S. v. General Motors Corporation*, 121 Fed. (2d) 376, 401; *U. S. v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 546; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.) All interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected. Such incidents taking place within a state cannot be segregated “by an act of mental gymnastics” by labeling them as separate or direct or local. (*Nippert v. Richmond*, 327 U. S. 416.)

In *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 546, the Court said:

“We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce.

"But it does not follow from this that the court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached. . . . In short, a nation-wide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce."

The contract herein was clearly one involving interstate commerce. (*American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *Currin v. Wallace*, 306 U. S. 1; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533; *Walling v. Amidon*, C. C. A. 10th, 153 Fed. (2d) 159; *Fitch v. Kentucky-Tenn. Light & Power Co.*, C. C. A. 6th, 137 Fed. 12; *Armour v. Wanstock*, 323 U. S. 126; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *Roland Elec. Co. v. Walling*, 326 U. S. 657; *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173; *Borden Co. v. Borella*, 325 U. S. 679; *Boutelle v. Walling*, 327 U. S. 463.) The courts below erred in not so holding.

C. The Complaint Specifically Alleged that the Various Steps Involved in the Production of Beet Sugar, From the Preparation of the Ground for Planting of the Seed to the Sale in Interstate Commerce of the Extracted Sugar, Were "Inextricably Intermingled With and Directly Affected by Each Other" and Were "Part of One Transaction." Therefore, Interstate Commerce Was Involved.

Paragraph 5 of the complaint [T. 70-71] specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting to the sale in interstate commerce of the extracted sugar, were inextricably intermingled with and directly affected by each other and were part of one transaction. Since this case involved the granting of a motion to dismiss on the grounds that the complaint did not state facts sufficient to constitute a claim, these allegations must be taken as true. (*Columbia Broadcasting System, Inc. v. U. S.*, 316 U. S. 407, 414.)

D. Products of the Farm Which Are Subsequently Manufactured or Processed Into Articles of Interstate Commerce Are Within the Reach of the Anti-Trust Act. Price-Fixing Is Illegal per se. A Combination Among Interstate Processors Fixing Prices To Be Paid to Local Producers for Their Products Is Reached by the Sherman Act if the Processed Product Is Intended to Cross State Lines.

The District Court's opinion which was adopted by the Circuit Court states that "products of a farm which are subsequently manufactured or processed into articles of commerce are beyond the reach of said (Sherman Act)". This is erroneous.

In *Schulte v. Gangi*, 326 U. S. 712 the court said:

"We find nothing in the case that lends any support to the suggestion that a manufacturer's intra-state delivery to other manufacturers for further processing and ultimate interstate distribution interrupts production for interstate commerce."

In *Wickard v. Filburn*, 317 U. S. 111; *Curriu v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; *American Tobacco Co. v. U. S.*, 328 U. S. 781, and *Corn Products Refining Company v. Federal Trade Commission*, 324 U. S. 726, the Supreme Court held that products of a farm that were subsequently manufactured or processed were within the reach of the commerce clause.

The Supreme Court in *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465, said (emphasis added):

"With respect to the federal power to protect interstate commerce in the commodities produced, there is obviously no difference between coal mined or stone quarried and fruit and *vegetables grown*. The same principle must apply and has been applied to injurious restraints of interstate trade which are caused by the practices of *manufacturers and processors*."

In *Curriu v. Wallace*, 306 U. S. 1, 10; *Mulford v. Smith*, 307 U. S. 38, 47, and *U. S. v. Rock Royal Coop. Inc.*, 307 U. S. 533, the Court held: "Where commodities are bought for use beyond state lines," the sale is a part of interstate commerce.

*American Tobacco Co. v. U. S.*, 328 U. S. 781 and companion cases involved the Big Three Tobacco companies (American Tobacco Company, Liggett & Myers

Tobacco Company and R. J. Reynolds Tobacco Company). They sold from 70% to 80% of the country's cigarettes, a product manufactured from the tobacco purchased from the growers in "local" auctions. They were accused of conspiring to fix prices and to exclude undesirable competition against them in the purchase of domestic type of flue cured tobacco and burley tobacco, the raw materials essential to the production of cigarettes sold by them. The court pointed out the following restraints of trade directed against the grower:

(1) The Big Three refused to purchase tobacco on a local market unless all three were present.

(2) One would not participate in new local markets unless the other two were present.

(3) Each placed limitations and restrictions on the prices their buyers were permitted to pay at local auctions and each put on the same ceiling.

(4) Grades were formulated by the three, which resulted in the absence of competition.

The Big Three of the tobacco industry controlled from 70% to 80% of the cigarette market. The Big Three of the sugar beet industry controlled 100% of the sugar refining industry of Northern and Central California. The tobacco Big Three purchased leaf tobacco which had to be processed into cigarettes. None of the purchased leaf tobacco was sold as such by the Big Three. The sugar beet Big Three purchased sugar beets which had to be processed into sugar. None of the purchased sugar beets were sold as such by this Big Three.

The tobacco Big Three were convicted of violation of the Sherman Act by conspiring to control local prices paid

to local farmers who produced their tobacco locally and who sold it locally to a purchaser who manufactured it into cigarettes which were sold in interstate commerce. The sugar-beet Big Three likewise conspired to control prices paid to local farmers who produced their beets locally and sold them locally to purchasers who manufactured them into sugar sold in interstate commerce. The sugar beet Big Three are also guilty of violating the Sherman Act.

As the Supreme Court said in the tobacco case: "It is not the form of combination but the result to be achieved the statute condemns."

The tobacco case cannot be distinguished from the case at bar and the courts below erred in holding that the products of a farm, which are subsequently processed into articles of commerce, are beyond the reach of the Sherman Act.

The conspirators herein fixed and maintained the prices to be paid the growers. They refused to sell seed or to take beets from any grower except on the prices and terms the conspirators had agreed upon in advance. The growers could get no seed from any other source and could sell their beets commercially to no one else, because the conspirators had a complete monopoly of sugar-beet seeds and of sugar-beet refining in Northern and Central California.

Price fixing and price maintenance combinations, reasonable or unreasonable, are illegal *per se* under the Sherman Act, whether local or wholesale prices are involved. (*U. S. v. Frankfort Distilleries*, 324 U. S. 293, 296; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, 213;

*U. S. v. Masonite Corp.*, 316 U. S. 265, 274; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.)

Nevertheless, the courts below held that the law was not violated, despite the price fixing and price maintenance combination, because the purchase of the beets was a "local" affair. This is directly contrary to the holding of the Supreme Court in *U. S. v. Frankfort Distilleries*, 324 U. S. 293, where the court, in discussing the fixing of local prices, said at page 297 (emphasis added):

"These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which take place within a state. In resolving them, there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the state.

The sole ultimate object of respondent's combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it exercised all the power it possessed.

"The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance."

The Sherman Act has repeatedly been held by the Supreme Court to apply to the fixing of local or retail prices. (*U. S. v. Univis Lens Co.*, 312 U. S. 241, 253; *Ethyl Gasoline Corporation v. U. S.*, 309 U. S. 436; *Dr. Miles*

*Medical Co. v. John D. Park & Sons*, 220 U. S. 373; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720, and *American Tobacco Co. v. U. S.*, 328 U. S. 781.)

The courts below ignored these cases and applied to the Sherman Act the long discarded mechanical tests of "manufacture," "production" and "local". They erred in so doing.

**E. Plaintiffs' Cause of Action Does Not Depend on Plaintiffs Being Engaged in Interstate Commerce, Because the Price-Fixing Acts Complained of Were a Part of the Conspirators' Interstate Commerce.**

*American Tobacco Co. v. U. S.*, 328 U. S. 781;

*U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720;

*U. S. v. Frankfort Distilleries*, 324 U. S. 293;

*Currin v. Wallace*, 306 U. S. 1;

*U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120.

"The Sherman Act denounced every conspiracy in restraint of trade, including those carried on by acts constituting intrastate commerce."

*Local 167 v. U. S.*, 291 U. S. 293, 297.

"Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce."

*U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120.

"Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation."

*Currin v. Wallace*, 306 U. S. 1;

*U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533.

Congressional power over interstate commerce reaches back to the steps prior to transportation in interstate commerce.

*U. S. v. Darby*, 312 U. S. 100, 117;

*Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 154.

"Congressional authority to protect interstate commerce is not limited to transactions which can be termed an essential part of a flow of interstate or foreign commerce."

Activities intrastate in character, when separately considered, come under the Commerce Clause if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions. (*N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36, 37; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465, 466; *U. S. v. Darby*, 312 U. S. 100, 122; *Wickard v. Filburn*, 317 U. S. 111.)

Most interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected in fact. Such incidents cannot be segregated by an act of mental gymnastics by labeling them as "separate and distinct" or "local."

*Nippert v. Richmond*, 327 U. S. 416.

F. If Respondent Refiner Had Itself Grown the Beets Besides Refining Them and Selling the Sugar, Each Step Would Have Been Part of the Stream of Interstate Commerce. This Stream Was Not Broken Because an Independent Contractor Performed Some of the Steps.

In *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173, the Court said:

"If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act." (The Fair Labor Standards Act of 1938.)

"Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts. *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 90."

See, also:

*Walling v. Amidon* (C. C. A. 10th), 153 F. (2d) 159, 161.

*Roland Electric Co. v. Walling*, 326 U. S. 657, involved a Maryland corporation doing business only in Maryland in wiring and installing motors for industrial uses engaged in interstate commerce. The Supreme Court pointed out that if Roland Electric had not done the work, the industrial users would have had to do it themselves, and therefore Roland Electric was engaged in "the production of goods for commerce." So, here, if plaintiffs had not planted the seed (bought from respondent), raised the beets, and delivered them to respondent to be processed into sugar to be sold in interstate commerce, respondents would have had to do those acts themselves. Therefore, plaintiffs were engaged "in production of goods for commerce," and the Sherman Act applied.

4. The Courts Below Erroneously Held That Appellants, Although Damaged by the Price-Fixing Conspiracy Could Not Recover Because Some Other Farmers Were Not Damaged to the Same Extent.

The District Court in its Opinion stated:

"From the complaint it appears that the net result of the conspiracy was that all growers in said area received the same price for their sugar beets and while the plaintiffs may have suffered a detriment, growers delivering their beets to other sugar refineries received an advantage."

There is no basis in the record for this statement.

It is true that the result of the conspiracy was that all growers in the district received the same price for the same product, *regardless of with which refinery they dealt*. That alone rendered the combination illegal. But that does not mean that certain growers received more than they would otherwise have received. All growers, as a result of the conspiracy, lost the advantages of competition because the refineries "no longer competed with any of the other manufacturers . . . as to efficiency of sales or manufacturing organizations" [Comp., Par. IX-c, T. 76-7]. "Defendant as a result of said conspiracy did not during said crop season of 1939, 1940 or 1941 conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but there was competition between itself and the other manufacturers) or in as efficient or careful a manner as it would have, had said conspiracy not existed." [Comp., Par. XI, T. pp. 78-9].

*This meant that all growers were damaged by the conspiracy but that plaintiffs and the other growers who*

dealt with the most efficient of the three conspirators were damaged more than the rest, because they lost not only the advantage of competition but also the advantage of dealing with the most efficient of the three conspirators.

But even if some growers who dealt with one of the other conspirators received more for their sugar as a result of the price-fixing conspiracy than they otherwise would have received, the injury done plaintiffs and the other farmers who dealt with defendant is not excused. If it were, then price-fixing conspirators could with immunity injure or even wipe out one group after another as long as all groups were not affected at once.

Price-fixing agreements are illegal *per se* and "it is no excuse for monopolizing a market that the monopoly has not been used to extract from the consumer more than a fair profit." (*U. S. v. Aluminum Co. of America*, 148 Fed (2d) 416.)

In *American Tobacco Co. v. U. S.*, 328 U. S. 781, the Court stated:

"The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised or that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Frequently conspirators have claimed that their conspiracy to restrain prices was justified because of the economic good the conspiracy achieved but just as frequently the Supreme Court has ruled that price-fixing agreements are illegal *per se* and that good motives or economic results are immaterial. (*U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, 213.) Price-fixing, reasonable or unreasonable, is unlawful *per se*. (*U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.)

5. **Trade Includes Both Buying and Selling. It Is No Excuse for Monopoly That Prices Are Not Raised to the Ultimate Consumer.**

In *Montrose Lumber Co. v. U. S.* (C. C. A. 10th, 1941), 124 Fed. (2d) 573, the Court said:

"It is true that in most cases of monopoly of trade, sellers and not buyers, are the actors. However, Sec. 2 of the Sherman Act embraces monopolies of trade and commerce among the several states by whomsoever effected. (577) . . . Trade necessarily involves both buying and selling and the control of either monopolizes trade" (p. 578).

In *White Bear Theatre Corp v. State Theatre Corp.*, (C. C. A. 8, 1942), 129 F. (2d) 600, the court said (p. 604):

"The competitive freedom of such markets in both buying and selling, is one of the principal things which the Sherman Act was intended to protect."

In *American Tobacco Co. v. U. S.*, 328 U. S. 781, the court said:

"The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised or that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

The decision in *U. S. v. Aluminum Co. of America*, 148 F. (2d) 416, which, has in effect been adopted by the Supreme Court as its own decision, stated:

"It is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit."

At page 445, the court stated:

"There remains only the question whether this assumed restriction had any influence upon prices. . . . To that *Socony-Vacuum Oil Co. v. United States*, 310 U. S. 150, 84 L. Ed. 1129, is an entire answer. It will be remembered that, when the defendants in that case protested that the prosecution had not proved that the 'distress' gasoline had affected prices, the court answered that that was not necessary, because an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect upon prices, and was as unlawful as an agreement expressly to fix prices. The underlying doctrine was that all factors which contribute to determine prices, must be kept free to operate unhampered by agreements."

This decision in the *Aluminum* case is referred to by the Supreme Court in *American Tobacco Co. v. U. S.* (June 10, 1946), 328 U. S. 781, as a case decided "under unique circumstances which add to its weight as a precedent."

Paraphrasing the Circuit Court of Appeals for the Sixth Circuit, in *Fitch v. Kentucky-Tennessee Light and Power Co.*, 136 F. (2d) 12, we can say:

"Obviously, the price of the" (sugar beets) "directly affected the prices charged the consumers for" (raw sugar) "in various states."

In that case the coal produced by an intrastate operator and sold by him by local sales to be used to manufacture power, was held to be as much an element of the power as though it were a constituent part thereof—yet here the sugar beet, which was a constituent element of the sugar, was held not to be included within the interstate

commerce of which the sugar was a part. In *Walling v. Amidon*, (C. C. A. 10th), 153 F. (2d) 159, the intra-state producer of sand used to line troughs which carried molten metal to the furnaces of an interstate steel producer, was held to be the producer of goods for commerce. Yet here the production of sugar beets from which the interstate commodity sugar was extracted was held to be a local product, not reached by the Commerce Clause.

6. The District Court Relied Upon the 1886 Decision of *Coe v. Errol* (a Tax Case) and Upon Cases Following *Coe v. Errol*. *Coe v. Errol* Is No Longer Any Authority on Cases Arising Under the Sherman Act. The Circuit Court of Appeals Stated: "We Do Not Approve the Citation of Tax Cases as Authority for Any Issue in this Case." But the Remaining Cases Cited by the District Court (and Approved by the Circuit Court of Appeals) Are, With One Exception, Cases That Rely Upon the Tax Case of *Coe v. Errol*. The Exception Is *Parker v. Brown*, Which Supports Appellants' and Not Respondent's Position. As a Result, the Decision of the Circuit Court of Appeals Has No Foundation of Authority Whatsoever.

The Opinion of the Circuit Court stated:

"We have carefully examined the opinion (of the District Judge) and approve it except in the instances hereinafter set forth. We do not approve the citation of tax cases as authority for any issue in the case, although their citation presents no inconsistency in the opinion."

The opinion of the District Court cited *Coe v. Errol*, 116 U. S. 517; *Crescent Cotton Oil Co. v. State of Mis-*

Mississippi, 257 U. S. 129; *Dothan Oil Mill Co. v. Espy*, 220 Ala. 605, 127 So. 178; *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 22 F. (2d) 122, 125, and *Parker v. Brown*, 317 U. S. 341, 361.

*Coe v. Errol*, the case primarily relied upon by the District Court, is a tax case and therefore is not approved by the Circuit Court of Appeals. It was decided in 1886 and sets forth the law as to the power of a State to tax personal property that has not passed across the State line. Subsequent Supreme Court decisions have limited the effect of this case to situations involving local taxation or regulation and have held that the statements made therein do not apply to cases under the Sherman Act or the National Labor Relations Board Act (*Stafford v. Wallace*, 258 U. S. 495, 525; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466. *Coe v. Errol* was cited by the majority in *Carter v. Carter Coal Co.*, 298 U. S. 238, with Justices Cardozo, Brandeis and Stone dissenting, but the Supreme Court has subsequently held that *Carter v. Carter Coal Co.* does not state the law in so far as the Sherman Act and the N. L. R. B. Act are concerned. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *U. S. v. Darby*, 312 U. S. 100, 122. See discussion in *Hamlet Ice Co. v. Fleming* (C. C. A. 4th), 127 F. (2d) 165, 169).

The Circuit Court of Appeals specifically stated: "We do not approve the citation of tax cases as authority for any issue in the case" and yet, out of five cases cited by the District Court on interstate commerce, one of them was a tax case, three of them relied upon that tax

case, and only one, *Parker v. Brown*, 317 U. S. 341, did not. *Parker v. Brown* is of no benefit to respondent.

It cited the *Crescent Cotton Oil Co.* case, at p. 360, as an example of the cases holding "that for purposes of local taxation or regulation, manufacture is not interstate commerce even though the manufacturing process is of slight extent." "But courts are not confined to so mechanical a test" (p. 362), and limited such cases to situations involving local taxation or regulation in matters involving the safety, health and well-being of local communities. Yet the courts below erroneously applied such cases to the Sherman Act.

The opinion of the Circuit Courts of Appeals, therefore, stands in the paradoxical position of holding that tax cases are not "authority for issues in this case" and at the same time relying entirely upon cases which in turn rely upon those very tax cases!

*Crescent Cotton Oil Co. v. State of Mississippi* was a 1921 decision which relied primarily on *Coe v. Errol* and laid down the rule "that manufacture is not commerce and the fact that an article is intended for export to another state does not render it an article of interstate commerce."

This 1921 rule is not the law today and it has been specifically repudiated by the U. S. Supreme Court in *Wickard v. Filburn*, 317 U. S. 111; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *U. S. v. Darby*, 312 U. S. 100; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533; *Currin v. Wallace*, 306 U. S. 1, 12; *Mulford v. Smith*, 307 U. S. 38, 47, etc. *Wickard v. Filburn* held

that the "mechanical application of legal formulas" (such as set forth in the cases cited by the District Judge) is "no longer feasible" (p. 124) and that the "few dicta and decisions of this Court which might be understood to lay it down that activities such as 'production,' 'manufacturing' and 'mining' are strictly local and . . . cannot be regulated under the commerce power . . . are not the law today." But the Circuit Court, by adopting the decision of the District Court has held that such dicta and decisions are the law today in the Ninth Circuit! The same case said: "Whether the subject of the regulation in question was 'production,' 'consumption' or 'marketing' is, therefore, not material for purposes of deciding the question of Federal power" *The very question that the Supreme Court held "not material for purposes of deciding the question of Federal power" was the very one used by the courts below for deciding the question!*

*Dothan Oil Mill Co. v. Espy*, 220 Ala. 605, 127 So. 178, cited by the District Court, is another of the earlier cases applying the *Coe v. Errol* doctrine of the tax cases. In that case certain cotton ginneries were charged in the state court in 1938 with conspiracy to restrain trade. The defendants seeking to avoid liability claimed that the matter came within the exclusive jurisdiction of the Federal Trade Commission. The Alabama Court upheld the state's jurisdiction. If that case is authority for the proposition that the Federal courts did not have jurisdiction over the facts therein set forth, then it is contrary to *Wickard v. Filburn*, 317 U. S. 111; *U. S. v. Wrightwood Dairy Co.*,

315 U. S. 100; *Currin v. Wallace*, 306 U. S. 1; *American Tobacco Co. v. U. S.*, 328 U. S. 781, and numerous other cases we have cited.

The District Court cited *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 22 F. (2d) 122. This was decided in 1927 before the Supreme Court had expanded the application of the exercise of power under the Commerce Clause. The first authority it cited was the tax case of *Coe v. Errol*. The *Utah-Idaho Sugar Co.* case is not the law today. In *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, the Supreme Court specifically held that the intrastate sale of dextrose used to manufacture candy was subject to the Federal Trade Commission Act where the dextrose was used to manufacture candy sold in interstate commerce. This case and *U. S. v. Darby*, 312 U. S. 100, have in effect overruled the doctrine of the *Utah-Idaho Sugar Co.* case.

*Winslow v. Federal Trade Commission* (C. C. A. 4th), 277 Fed. 206, was another Circuit Court of Appeals case which had followed the tax cases and reached the same result as did the Court in the *Utah-Idaho Sugar Co.* case and the Courts below. But in a later decision of the Fourth Circuit (*Hamlet Ice Co. v. Fleming*, 127 F. (2d) 165), the Court pointed out at page 169 that *U. S. v. Darby*, 312 U. S. 100, had changed the law as expressed in the *Winslow* case by extending the application of the Commerce Clause to intrastate activities which affected interstate commerce.

7. The District Court Erroneously Held That Farmers Who Either Had to Sign the Crop Contract Prepared by the Conspirators or Not Grow Any Sugar at a Time When Sugar Was Vitally Needed by This Nation, Were in Pari Delicto and Could Not Recover Because They "Joined the Conspiracy and Furthered the Object of the Same" by Signing the Contract. The Circuit Court of Appeals, Instead of Repudiating Such a Holding Stated: "We Do Not Reach and Therefore Make No Expression Upon This Claim." The Circuit Court of Appeals Erred in so Doing. The Doctrine Enunciated by the District Court Would Result in Making "Private Remedies Under the Sherman Act Illusory if Not Non-Existent for Many, Perhaps Most, Victims of Restraint of Trade." The Circuit Court of Appeals Should Not Have Remained Passive When Faced With Such a Doctrine but Should Have Definitely Repudiated It. This Court Should Establish Uniformity by Repudiating the District Court's Doctrine.

Plaintiffs, faced with the choice of either not growing sugar beets or signing one of the conspirators' contracts, signed the contracts, secured the seed, grew the sugar beets, and delivered them to the only manufacturing source available, one of the conspirators' refineries. The district judge held that this made the farmers co-conspirators.

Even if the plaintiffs knew of the conspiracy, they could nevertheless recover. From the days of Lord Mansfield (*Browning v. Morris* (1778), 98 Eng. Reprint, 1364), it has been uniformly held that "where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of

men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, there the parties are not *in pari delicto*." (See, also, 12 Am. Jur. 735, Sec. 218; *McAllister v. Drapeau* (1939), 14 Cal. (2d) 102, 112.)

In *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U. S. 359, it was held that where a plaintiff "had complied with the defendant's restrictive terms of sale merely for the reason that otherwise he could not purchase or secure the goods necessary for the conduct of its business" he was not *in pari delicto*.

This was followed in *Rankin v. Associated Bill Posters*, 42 F. (2d) 152, 155 (cert. den. 282 U. S. 864); *Hartford Empire Co. v. Glenshaw Glass Co.*, 47 Fed. Supp. 710, 711, and *Ring v. Spina* (C. C. A. 2d, 1943), 148 F. (2d) 647, 652. See, also, *Sala Electric Co. v. Jefferson etc. Co.*, 317 U. S. 173.

*Ring v. Spina* presents a situation almost identical with the one at bar. There the plaintiff sued under the Sherman Act, alleging that the restraint of trade was accomplished by means of the agreement of the Dramatists Guild. Plaintiff signed it because otherwise he could not have produced his play. The District Court held, as did the district judge, here, that by signing the agreement the plaintiff became *in pari delicto*. This was reversed by the Second Circuit, which stated, 148 F. (2d) 647, 652:

"It is well settled that where one party to an illegal contract acts under the duress of another the parties are not *in pari delicto*. (Citing authorities.)

And in actions for triple damages under the Sherman Act a showing of economic duress similar to that asserted here has been held sufficient proof that the

plaintiff is not a party to the monopoly. (Citing cases.)

"But here even without a showing of economic coercion as the final step in forcing him to sign the Basic Agreement, plaintiff is precisely the type of individual whom the Sherman Act seeks to protect from combinations fashioned by others and offered to such individual as the only feasible method by which he may do business. Considerations of public policy demand court intervention in behalf of such a person, even if technically he could be considered in *pari delicto*. Indeed, this is a general principle applicable beyond the anti-trust field. (Citing cases.)

Any other conclusion would mean that for many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent."

Faced with this doctrine, which as the Second Circuit said, means "that for many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent," the Circuit Court of Appeals remained passive and said: "We do not reach and therefore make no expression upon this claim."

We respectfully submit that such doctrine should have been repudiated instead of being permitted to remain as the rule of the Southern District of California, and that the Supreme Court, in order to secure uniformity within the circuits and to protect victims of restraint of trade should apply the *Ring v. Spina* doctrine in this case. This issue of law must be determined in view of the District Judge's ruling, and this is the logical time and place for that determination.

#### IV—CONCLUSION.

If the decision of the Circuit Court of Appeals remains as the law in the Ninth Circuit, the farmers of that vast area will be deprived, for all practical purposes, of the benefits of the Sherman Act; they will be helpless before the price-fixing and price-maintenance conspiracies and monopolies of refineries, packers, canners and processors, who can adopt the technique used by the conspiring sugar refiners herein of fixing prices and conspiring as to farmers, state by state, as long as they restrict their processing, canning, packing, refining, etc., to the state in which the products was produced by the farmers before shipping the completed product into interstate commerce.

We respectfully submit that such is not the law as enunciated by the Supreme Court of the United States for many years and that the Petition for Writ of Certiorari should be granted and that upon hearing thereof the Judgment of the Circuit Court of Appeals and the District Court should be reversed and the doctrine of the *Big Three Tobacco Companies* cases should be made applicable to the Ninth Circuit as well as the rest of the country.

Respectfully submitted;

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